RESTRICTIONS UPON THE USE OF LAND.

A RESTRICTION may be defined as an agreement concerning the use of land by its owner which runs with the land in equity. Strictly speaking, restrictions did not exist till about 1840, for not till that time was the distinctive quality, that of running with the land, recognized. Long before this, however, covenants that to-day would be called restrictions had been enforced in equity; but the suits, being between the contracting parties, had raised only the ordinary questions of specific performance of contracts.[1] When first suit was brought against a purchaser of the land from the covenantor, the question was still treated as one of specific performance.[2] The inquiry was made whether the covenant ran with the land at law. If it ran, then the purchaser was subject to a legal obligation, which equity might specifically enforce. If not, then there was no obligation, either at law or in equity.

In neither of the two cases referred to were these points fairly in issue. As dicta, the opinions were unfavorably received by the profession,[3] and shortly afterwards discredited by actual decisions. In Whatman *v.* Gibson[4] a covenant against certain trades was enforced by injunction against a purchaser of the land with notice of the covenant, the court merely remarking that it "saw no difficulty" in so doing. In Mann *v.* Stephens[5] a covenant against building was enforced under similar circumstances, and with equal brevity. Tulk *v.* Moxhay[6] contains the first discussion of the principle upon which the court proceeds. That was a case upon a covenant by a former owner of land to maintain a garden. An injunction was granted against the erection of houses. Cottenham, L. C., says: "That this court has jurisdiction to enforce a contract between the owner of land and his neighbor purchasing part of it, that the latter shall either use or

[1] Barret *v.* Blagreave, 5 Ves. 555; Macher *v.* Foundling Hospital, 1 Ves. & B. 188; Rankin *v.* Huskiston, 4 Sim. 12; Old Steyne's Case, 2 Sugd. Vend. (10th ed.) 500.

[2] Duke of Bedford *v.* British Museum, 2 M. & K. 552; Keppel *v.* Bailey, 2 M. & K. 517.

[3] Sugden, Vend. (10th ed.) 492.

[4] 9 Sim. 196.

[5] 15 Sim. 379.

[6] 2 Phill. 774.

abstain from using the land purchased in a particular way, is what I never knew disputed. . . . It is said that the covenant, being one which does not run with the land, this court cannot enforce it; but the question is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. . . . If an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased."

In the leading cases in other jurisdictions, this same principle is laid down: the purchaser is bound because it is inequitable that he should escape liability, and this injustice exists either because he buys with notice,[1] or takes the land without giving value.[2]

To put it technically, the purchaser is bound by the ordinary principles of constructive trusts, precisely as a purchaser of land from one who has previously contracted to sell it is bound by the contract. To raise such a constructive trust, it is essential (1) that there shall be a contract concerning the use of land; (2) that it shall be one which equity can specifically enforce; (3) that the intention shall be that the contract shall run with the land. Under such contract, the promisor incurs an equitable as well as a legal obligation. The equitable obligation ceases when he parts with the land, for the contract has reference to acts of the owner of the land, and a decree for performance, if at all, must be against the owner for the time being. That is, the equitable obligation binds the promisor not personally, but in respect of his ownership of the land. The equity is attached to the land in the same way that any trust is attached, and will follow the land until it comes into the hands of a *bona fide* purchaser.[3] Against the original owner of the land, a restriction is a question of specific performance of a contract: against a subsequent purchaser, the question is one of trusts.

Although these principles are clearly recognized in the early cases, the courts of recent times have fallen into singularly con-

[1] Whitney *v.* Union Ry. Co., 11 Gray, 359, at 364; Marshall *v.* Brewer, 19 N. J. Eq. 537, at 543; Barrows *v.* Richards, 8 Paige, 351.

[2] Wolfe *v.* Frost, 4 Sand. Ch. 72, at 88.

[3] Prof. Langdell in 1 Harv. L. Rev. 65; Prof. Ames, 1 Harv. L. Rev. 3.

fused notions of restrictions. In L. & N. W. Ry. Co. *v.* Gomme,[1] Jessel, M. R., says, "This is an equitable doctrine establishing an exception to the rules of common law, which did not treat such a covenant as running with the land, and it does not matter whether it proceeds on an analogy to a covenant running with the land, or an analogy to an easement." And similar statements are found in other jurisdictions.[2] It seems to the writer that the two analogies suggested above are entirely misleading. The distinctions between restrictions and covenants running with the land are numerous and radical. A covenant must of course be under seal: a restriction may be created by simple contract.[3] Any kind of an agreement, affirmative or negative, is binding by way of a covenant: as will be noticed hereafter, restrictions are practically limited to negative agreements. Again, the question whether a covenant runs with the land at law depends on questions of privity of estate between the contracting parties: equity takes no cognizance of such questions. But given this privity, a covenant runs regardless of notice to the purchaser, while notice is essential in case of a restriction.

The analogy between a restriction and an easement is more striking, and has been adopted as the deciding principle in numerous cases. According to this view, restrictions grew out of the limitation upon easements. Easements are restricted to a few subjects, such as rights of way, support, etc.; the need was felt of a right that should cover a wider range, and equity invented that right. This view treats a restriction as a right, purely equitable, yet distinct from all other branches of equity jurisdiction, proceeding on the analogy to easements, borrowing its rules from the law of easements and adapting them to suit the procedure in equity. It assumes that the decisions in Whatman *v.* Gibson and Tulk *v.* Moxhay were pieces of judicial legislation, although the judges had no idea they were doing more than applying established rules of equity. Such a theory will not be accepted, if any other explanation can be offered. If it be true, a restriction is an anomaly. When a new case presents itself, a lawyer cannot turn for precedents to other branches of equity jurisdiction. He must see what legal rule is most analogous, and guess whether a court of equity

[1] 20 Chan. Div. 583.

[2] Norcross *v.* James, 140 Mass. 188, at 193; Columbia Coll. *v.* Lynch, 70 N. Y. 440, at 447.

[3] Tulk *v.* Moxhay, 2 Phil., at 778.

will adopt that rule, or reject it. Again, upon this view principles of restrictions would apply only to real estate. It would seem, however, that restrictive covenants concerning personal property will be enforced against purchasers with notice, when the property is of peculiar value.[1]

There is one other possible meaning of the term "equitable easement." A restriction is analogous to an easement in the same way that a *cestui que trust* resembles the owner of land, or a pledge of title deeds a mortgage. It may be said that there are equitable easements, in the same sense as there is equitable ownership or an equitable mortgage; all are forms of trusts. This view is consistent with the theory of Tulk *v.* Moxhay, and reconciles it to the apparently inconsistent statements in some later opinions. That theory so completely explains the actual decisions that I shall assume it to be correct.

This theory presents two sets of questions: first, regarding the creation of a restriction, which is decided upon principles of specific performance of a contract; secondly, the question whether it runs with the land, which is decided upon principles of constructive trusts. As to the first point, it is clear that there must be a binding contract; but no formalities are necessary. A restriction may be imposed by covenant, — the ordinary case, — or by simple contract,[2] or by contract implied from the acceptance of a deed containing a stipulation by words of reservation,[3] proviso,[4] or condition.[5] The fact that a different remedy, *i.e.*, forfeiture of the estate, is attached to a condition does not prevent the implication of a promise not to do the act forbidden.[6] A restriction may be implied from acts of the parties, such as reference to plans showing a scheme of restrictions,[7] or representations of the owner.[8] But the evidence of an intention to create a restriction must be very clear, and mere reference to a building scheme will not compel the owner to abide by its provisions without change.[9]

[1] De Matteos *v.* Gibson, 4 De G. & J. 276; Clarke *v.* Hint, 22 Pick. 231.

[2] Dorr *v.* Harrigan, 101 Mass. 531.

[3] Peck *v.* Conway, 119 Mass. 546.

[4] Jeffries *v.* Jeffries, 117 Mass. 183.

[5] Parker *v.* Nightingale, 6 All. 341; Ayling *v.* Kramer, 133 Mass. 12.

[6] 3 Parsons on Cont. (6th ed.) 356; Logan *v.* Wienholt, 1 Cl. & Fin. 611; Plunkett *v.* M. E. Soc., 3 Cush. 561.

[7] Mackenzie *v.* Childers, 43 Chan. Div. 265.

[8] Piggott *v.* Stratton, 1 De G., F. & J. 33.

[9] Light *v.* Goddard, 11 All. 58; Squire *v.* Campbell, 1 My. & Cr. 459.

The contract creates an equitable interest in land, and is within the Statute of Frauds.[1] If it is not in writing it will not be enforced unless there has been part performance, or expenditure of money on the faith of it, sufficient to create an estoppel.[2] In Browne on the Statute of Frauds (4th ed.), § 269, the contrary statement is made; but the cases cited are not about restrictions, but personal contracts, or contracts concerning boundaries. There is, however, a distinction between a restriction and an ordinary trust in regard to the Statute of Frauds. In case of a trust, the name of the *cestui* must be in the written instrument. This is because the gist of the trust is the payment of the trust fund to the *cestui*, and the trust is wholly uncertain unless his name appears. The gist of a restriction is the doing or not doing certain acts to certain land. If the acts and the land are stated in writing, the court considers the statute satisfied, and will gather the other terms of the restriction by reading the writing as a whole in the light of surrounding circumstances. For this reason it is unnecessary that the writing should state to whom the benefit of the restriction shall accrue, whether to the covenantor personally or in favor of some other parcel of land. "This is a question of fact to be determined by the intention of the vendor, and that question must be determined upon the same rules of evidence as any other question of intention."[3] The ownership and character of buildings in the neighborhood,[4] plans,[5] building schemes,[6] the existence of similar restrictions upon other lots,[7] even parol agreements among neighbors,[8] may be shown as bearing upon the probable intention of the contracting parties.

It is generally stated that restrictions, as the name implies, are limited to agreements of a negative character.[9] This is not strictly true. Any agreement that equity will enforce between the contracting parties will equally be enforced as a restriction against a purchaser of the land. Equity decrees performance of a contract only where it can properly carry out its decree. It

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[1] Hubbell *v.* Warren, 8 All. 173; Wolfe *v.* Fiske, 4 Sand. Ch. 72; Rice *v.* Roberts, 24 Wis. 461.

[2] Wolfe *v.* Fiske, *supra.*

[3] Lord Esher in Nottingham Brick Works *v.* Butler, 16 Q. B. D. 778, at 784.

[4] Spicer *v.* Martin, 14 Aff. Cas. 12, at 25.

[5] Collins *v.* Castle, 36 Chan. Div. 243, at 251–2.

[6] Nottingham Brick Works *v.* Butler, *supra.*

[7] Childs *v.* Douglass, Kay, 560.

[8] Parker *v.* Nightingale, 6 All. 341.

[9] Heywood *v.* Brunswick Bldg. Soc., 8 Q. B. D. 403.

enforces contracts of giving, because performance is a simple matter; but a restriction, from the nature of the case, rarely falls within this class. The only case is Morland *v.* Cook,[1] where the agreement was to contribute toward the maintenance of a sea wall. Equity will always take jurisdiction over negative contracts, for the remedy is simple, — an injunction restraining the forbidden act, or a mandatory injunction to undo what has been done in breach of the agreement. Practically all restrictions belong to this class. Equity will not decree specific performance of affirmative contracts that call for the exercise of skill, discretion, or good faith; but when the required acts are of a simple nature it seems that the court will take jurisdiction. It has enforced contracts to keep in repair the stop-gate of a canal,[2] to construct an archway,[3] to lay a railway track over certain land,[4] and to maintain a switch.[5] In Cooke *v.* Chilcoat[6] a covenant to supply adjacent land with water was enforced, although it necessitated laying pipes and erecting machinery. This undoubtedly goes too far, and has since been overruled.

In some cases where the intention of the parties can be substantially carried out, a contract to do affirmative acts will be held to imply an agreement not to do certain acts inconsistent with the main agreement, and the doing of these acts will be restrained by injunction.[7] Thus a contract to lay out land as a garden has been enforced by enjoining the erection of houses,[8] and where there was a covenant to buy beer of the covenantee for use in a public house a subsequent purchaser of the house was enjoined from buying of any one else.[9]

Restrictions are also subject to the general rule that equity will not enforce a contract where it would work hardship or injustice. A plaintiff has no standing in court unless he has been diligent in pressing his claim. He is held to have waived his right if he has allowed the defendant to make expenditures in breach of the restriction without objection,[10] or if he has acquiesced in a breach

[1] L. R. 6 Eq. 252.
[2] Lane *v.* Newdigate, 10 Ves. 192.
[3] Storer *v.* G. W. Ry. Co., 2 Y. & C. C. 48.
[4] Wilson *v.* Furness Ry. Co., L. R. 9 Eq. 25.
[5] Lydick *v.* B. & O. R. Co., 17 W. Va. 427.
[6] 3 Chan. Div. 694.
[7] Lumley *v.* Wagner, 1 De G., M. & G. 616.
[8] Rankin *v.* Huskisson, 4 Sim. 12; Tulk *v.* Moxhay, 2 Phil. 774.
[9] Luke *v.* Dennis, 7 Chan. Div. 227; Colt *v.* Tourle, L. R. 4 Chan. 654.
[10] Eastwood *v.* Lever, 4 De G., J. & S. 118.

for an unreasonable time; but his acquiescence in a minor breach is not a waiver of the whole restriction.[1] For example, acquiescence in the maintenance of a low building does not permit the erection of a higher structure;[2] nor does acquiescence in a small stable waive objections to one intended for use by a street railway.[3]

When similar restrictions are placed on a number of lots, the release of the restrictions as to some lots will release them as to all, if the general scheme of improvement has been materially affected by the partial releases,[4] but otherwise if the releases do not detract from the value of the remaining restrictions.[5] This rule is part of a broad principle that equity will not interfere where, on account of changed conditions, a restriction no longer accomplishes the purpose for which it was designed — that is, where its usefulness is gone, though the burden still remains. In the British Museum case[6] a restriction was imposed for the benefit of land occupied by a palace and a park; the land was subsequently cut up into small lots and covered with buildings, and it was held that the restriction was gone. So when a restriction against trades is intended to improve a neighborhood as a residential quarter and the neighborhood has lost that character, the restriction will not be enforced.[7]

In no case will a restriction be enforced unless it is of value commensurate with the burden. But it is unnecessary to show that the particular breach which it is sought to enjoin will cause substantial damage;[8] provided the restriction has some substantial value, any breach will be enjoined unless so trivial as to come within the principle *de minimis*.[9]

The third essential of a restriction, as has been stated, is the intention that it should bind future owners of the land. This is always an ordinary question of construction; no words of limitation, no mention of "assigns," are necessary.[10] There are two cases,

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1 Richards *v.* Revitt, 7 Chan. Div. 224. 2 Gaskin *v.* Balls, 13 Chan. Div. 324.

3 Whitney *v.* Union St. Rwy., 11 Gray, 359.

4 Peck *v.* Williams, L. R. 3 Eq. 15; Williams *v.* Roper, Turn. & R. 18.

5 Macher *v.* Foundling Hosp., 1 Ves. & B. 188; German *v.* Chapman, 7 Chan. Div. 271. 6 2 My. & K. 552.

7 Sayers *v.* Collyer, 24 Chan. Div. 180; Thacher *v.* Columbia Coll., 87 N. Y. 311.

8 Mannus *v.* Johnson, 1 Chan. Div. 673; Tipping *v.* Eckersley, 2 K. & J. 264, at 270.

9 Att. Gen. *v.* Algonquin Club, 153 Mass. 447.

10 Wilkinson *v.* Rogers, 10 Jur. N. S., 792; Hodges *v.* Sloan, 107 N. Y. 244.

however, that are apparently inconsistent.[1] It has been held that when part of a quarry or a clay pit was sold with a covenant that no stone or clay should be sold therefrom, such covenant was personal and did not run with the land. In both cases the intention of the parties seems clearly to have been that both the benefit and burden of the contract should adhere to the land; and the decisions must be supported upon the ground that the contracts were illegal because designed to create a monopoly. In a New York case a view was taken contrary to that of the two cases cited.[2]

Given a valid contract, intended to run with the land, such as equity has the power to enforce, the question becomes one of constructive trust. Such a contract is binding upon one who takes as volunteer,[3] or with notice, unless there has been a mesne conveyance to a purchaser for value without notice.[4] The notice may be actual or constructive. In the United States, the registry system supplies constructive notice. Aside from this, a purchaser is bound by notice of everything that appears in his title-deeds,[5] or from the character of the land in the neighborhood, as when all the houses in a block are built upon some uniform plan.[6] The law is not clear upon the point how far one having notice of a restriction is bound to find out from extrinsic evidence for whose benefit the restriction was intended. In Parker *v.* Nightingale[7] a purchaser was held to notice of the fact that his land had been part of a partition between tenants in common, and that there had been a parol agreement among them concerning restrictions. The rule seems to be that a purchaser who knows of the restriction is bound to notice of all facts aiding in its construction which the exercise of reasonable diligence would disclose.

The question who may enforce the restriction is, perhaps, the most important part of the subject. There are three possibilities: the restriction may be for the benefit of the promisee personally, of other land of his, or of somebody's else land. The question is determined according to the intention of the parties. Most

[1] Norcross *v.* James, 140 Mass. 188; Brewer *v.* Marshall, 19 N. J. Eq. 537.
[2] Hodges *v.* Sloan, 107 N. Y. 224.
[3] Wolfe *v.* Frost, 54 Sand. Ch. 72; Toll Br. Co. *v.* Vreeland, 4 N. J. Eq. 157.
[4] Nottingham Brick Works *v.* Butler, 16 Q. B. D. 778.
[5] Wilson *v*, Hart, L. R. 1 Chan. 463. [6] Spicer *v.* Martin, 14 App. Cas. 12.
[7] 6 All. 341.

frequently extrinsic evidence is necessary to explain the written instrument upon this point, and when this is done certain rules of construction are applied. The instrument is construed so as to make the burden of the restriction as light as possible, and the right is held personal to the promisee unless the contrary intention clearly appears.[1] If, however, the adjoining land belongs to the promisee, and is benefited by the restriction, there is a presumption that it was intended to be appurtenant to that land,[2] particularly if there is any uniform scheme regarding the two lots, or reference to plans.[3] If this intention be manifest, equity has no difficulty in carrying it into effect: it presumes an assignment of the restriction by the owner when he sells the land to which it is attached, and an acceptance by the purchaser, whether he knows of the restriction or not.[4]

When the intention is that the restriction shall inure to the benefit of land not owned by the covenantee, a stricter construction still is demanded. The case usually arises when the owner of land divides it into building lots according to some scheme of improvement; he sells the lots at different times, placing restrictions upon them according to this scheme. It is evident that any particular restriction inures to the benefit of lots remaining unsold in the hands of the grantor; but can it be made appurtenant to lots sold previously? At the time the restriction is imposed, the grantor and the prior purchaser of lots are strangers; can the grantor donate the benefit of the restriction under such circumstances to a stranger? It is held that he can,[5] and rightly, it would seem; for there is never any objection to making a contract for the benefit of another, and a restriction is only a contract. But the courts are properly cautious in giving effect to such a transaction.

It makes little difference whether a restriction is personal to the covenantee or appurtenant to his land, but if it can be made

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[1] Badger *v.* Boardman, 16 Gray, 559; Lowell Inst. for Sav. *v.* Lowell, 153 Mass. 530; Masters *v.* Hansard, 4 Chan. Div. 718; Keats *v.* Lyon, 4 Chan. App. 218.

[2] Renals *v.* Cowlinshaw, 9 Chan. Div. 125; Peck *v.* Conway, 119 Mass. 546.

[3] Childs *v.* Douglass, Kay, 1; Tobey *v.* Moore, 130 Mass. 448.

[4] Patching *v.* Dubbins, Kay, 560.

[5] Collins *v.* Castle, 36 Chan. Div. 243; Spicer *v.* Martin, 14 App. Cas. 12; Nottingham Brick Works *v.* Butler, 16 Q. B. D. 778; Parker *v.* Nightingale, 6 All. 341; Jeffries *v.* Jeffries, 117 Mass. 188; Payson *v.* Burnham, 141 Mass. 547; Hamlin *v.* Werner, 144 Mass. 396; Barrows *v.* Richards, 8 Paige, 351.

appurtenant to neighboring land the burden may be indefinitely increased. When the intention is collected from extrinsic evidence, it must appear with extreme clearness just what land is to have the benefit. At one time it was felt that the land seeking to enforce a restriction must itself be subject to a reciprocal covenant in favor of the other lot; but this is no longer necessary.[1] The language of a late opinion[2] would lay down the rule that a prior purchaser can sue a subsequent purchaser of part of a building estate only when there had been, from plans, representations, or mode of sale, an implied agreement by the common vendor with the earlier purchaser that any restriction subsequently imposed shall inure to his benefit — that is, the vendor cannot give the benefit of the restriction away, but may sell it. It is hardly to be supposed that any such limitation will be kept. The true rule probably is that there must be some very strong evidence, like the existence of a building scheme, mutual covenants, or express statements by the vendor as to the subsequent restrictions, before the court will construe the restriction as appurtenant of the lots previously sold. But when the intention is manifest in the writing itself, there is no objection to giving effect to it.[3]

It has been suggested that these cases might be explained upon other grounds. The vendor, it is said, who puts up lots for sale according to a building scheme impliedly covenants with the purchaser of the first lot that all the remaining lots shall be subject to the restrictions noted in the scheme, and that this covenant is binding upon subsequent purchasers of lots. There are three objections to this. We have seen that a court is extremely reluctant to imply restrictions from such transactions; the restrictions, if implied, would rest upon acts of which subsequent purchasers would probably have no notice; moreover, the cases do not state whether the purchasers had notice, and the opinions contain no inquiry upon this point. The court in each case professes to enforce the express covenant of the subsequent purchaser, and not the implied covenant (if any) of the vendor.

Both benefit and burden of a restriction may be apportioned. When land to which a restriction is appurtenant is divided the

[1] Collins *v.* Castle, 36 Chan. Div. 243.

[2] Hall, V. C., in Renals *v.* Cowlinshaw, 9 Chan. Div., at 129.

[3] Barrows *v.* Richards, 8 Paige, 351.

benefit follows each lot,[1] and the same is true of the burden; but when part of land subject to a restriction is sold, one part cannot claim the benefit of the restriction over the other.[2]

As has been said, the theory upon which equity makes the restriction run with the land is by an implied assignment of the contract. The original parties to the contract upon parting with the land cease to have any real interest. The real parties in interest, the owners of the dominant[3] and servient[4] tenements, may bring suit and be sued without joining their predecessors in title; and when a restriction inures for the benefit of several lots, the owner of one may bring suit without joining the other owners.[5]

The whole subject of restrictions is still in its infancy. Outside England, Massachusetts, and New York, the cases are few, and even in those three jurisdictions the questions uncovered by decisions are not very numerous. Such cases as do exist seem, however, completely to establish this proposition. Fresh questions, as they arise, are to be solved by answering one or both of these questions: (1) as against the party creating the restriction, is there a case for the specific performance of the contract? (2) as against subsequent purchasers of the land, do the circumstances of his purchase give rise to a constructive trust?

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[1] Schwoerer *v.* Boylston Market Ass., 99 Mass. 285.

[2] Jewell *v.* Lee, 14 All. 145; King *v.* Dickinson, 40 Chan. Div. 596.

[3] Nottingham Brick Works *v.* Butler, 16 Q. B. D. 778, at 784; Schwoerer *v.* Boylston Market Ass., *supra*.

[4] Hall *v.* Ewin, 37 Chan. Div. 80.

[5] Western *v.* M'Dermott, L. R. 2 Chan. 72; Harrison *v.* Goode, L. R. 11 Eq. 349.